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IN THE

Supreme Court of the United States

October Term, 1972

No.

MICHAEL ANTHONY TOMEO,

Petitioner,

v.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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No.

MICHAEL ANTHONY TOMEO,

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UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

The Petitioner, Michael Anthony Tomeo, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on May 15, 1972.

OPINION BELOW

The Opinion of the Court of Appeals, not yet reported, appears in the Appendix ("App.") hereto at p. 1a, *infra*. No Opinion was rendered by the District Court for the District of Colorado.

JURISDICTION

The Opinion of the Court of Appeals for the Tenth Circuit was rendered on May 15, 1972. A timely Petition for Rehearing was denied on June 14, 1972 (App., p. 6a, *infra*), and this petition for certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is evidence of the *receipt* of telephone calls made from another State regarding wagering sufficient to support a conviction under 18 U.S.C. §1084(a) which makes illegal only "the *transmission*"[1] in interstate commerce of such communications?

2. When Congress specified "transmission" in one subsection of a statute and "transmitting or receiving" in another subsection of that statute, may the subsection which uses the word "transmission" alone be interpreted as if – like the other subsection – "transmission" were used in conjunction with the word "receiving"?

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[1] Emphasis is added throughout this petition.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §1084, 75 Stat. 491, reads in pertinent part as follows:

> "(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for *the transmission* in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for *the transmission* of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.
>
> "b) Nothing in this section shall be construed to prevent *the transmission* in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for *the transmission* of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal.
>
> * * *
>
> "(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used

for the purpose of *transmitting or receiving* gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber * * * ."

STATEMENT OF THE CASE

The Indictment

The indictment against Petitioner charged that "being engaged in the business of betting and wagering, [he] did knowingly use and cause the use of a wire communication facility, that is, the interstate telephone, for the transmission in interstate commerce *from* Monroe, Wisconsin, *to* Denver and Adams County, Colorado, of information assisting in the placing of bets and wagers on sporting events and contests, such information consisting of the point spread on college and professional football games *and* the actual placing of bets and wagers on such games, all in violation of Title 18, United States Code, Section 1084" (App., p. 7a, *infra*). The two Counts in the indictment were identical except as to date. Count I in effect covered the 1968-1969 football season; Count II, the 1969-1970 football season.

The Trial

For purposes of this petition, it may be considered as conceded that Petitioner was engaged in the business of betting and wagering. The sole issue is whether he ever used an interstate wire communication for transmission in interstate commerce in violation of 18 U.S.C. §1084(a).

At the trial, only one witness, a Mr. Huber, testified concerning this aspect of the case.

Mr. Huber testified he had never seen Petitioner outside of Denver and that *he* had placed calls *from* Monroe, Wisconsin, which was the place where he resided and engaged in the lumber business, *to* Denver, Colorado, where Petitioner was when Mr. Huber talked to him. At times Mr. Huber obtained from Petitioner information such as the point spread which was readily available in any public newspaper, and at other times placed wagers with Petitioner.

There is no evidence whatsoever that Petitioner ever initiated any of the calls. The evidence showed only that Petitioner, while in Denver, had *received* telephone calls from Wisconsin which had been placed and initiated by Mr. Huber. Also, there was no evidence that Petitioner had ever been in Wisconsin and, *a fortiori*, there was no evidence that Petitioner had been involved in any way with the transmission of bets or information, *from* Monroe, Wisconsin *to* Denver and Adams County, Colorado, as charged in the indictment.

At the conclusion of the Government's case, Petitioner moved for a judgment of acquittal on the ground that there was insufficient evidence to sustain any conviction under the statute. The motion was denied. Thereafter, Petitioner was convicted on both Counts and was sentenced to consecutive terms of two years on Count I and one year on Count II for a total of three years.

The Court of Appeals Decision

In affirming the conviction, the Court of Appeals expressly recognized that there was a division among the Circuits as to the interpretation of the term "transmission"

as used in 18 U.S.C. §1084(a). The Court specifically acknowledged that two decisions had held that "transmission" did not include reception of, but extended solely to sending or initiating, the interestate wire communications.

Those two decisions are *Telephone News System, Inc. v. Illinois Bell Telephone Co.*, 220 F. Supp. 621 (N.D. Ill. 1963), *affirmed*, 376 U.S. 782 (1964), hereinafter referred to as "*Telephone News*"; and *United States v. Stonehouse*, 452 F.2d 455 (7th Cir. 1971), hereinafter referred to as "*Stonehouse*". To the contrary is *Sagansky v. United States*, 358 F.2d 195 (1st Cir.), *cert. denied*, 385 U.S. 816 (1966), hereinafter referred to as "*Sagansky*".

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW RECOGNIZES AND REFLECTS A DIVISION AMONG THE CIRCUITS AS TO THE CORRECT INTERPRETATION OF SECTION 1084(a).

The Court below expressly acknowledged, "At present the Circuits do not agree on the meaning and scope of section 1084(a)" (App., p. 3a, *infra*). Dramatically reflecting that conflict is the contrast between the judgment in this case and that in *Stonehouse*. In this case, the Court of Appeals affirmed a conviction where there was no evidence that Petitioner had initiated any calls and where the evidence showed *only the receipt* of interstate calls by Petitioner. Contrastingly, in *Stonehouse* the Court reversed a conviction under the identical statute where the evidence showed *only the receipt* of information transmitted over a telegraph ticker tape. On the critical issue of statutory interpretation, the Seventh Circuit in *Stonehouse*

declared: "Although we recognize that there is language in at least one case involving the use of the telephone that points in the other direction, we believe that the coverage of paragraph (a) of §1084 is limited to prohibited transmissions and does not encompass mere reception." 452 F.2d at 456-457 (footnote omitted).

The First Circuit in *Sagansky* held that this statutory provision could include reception; see also *United States v. Winston*, 267 F. Supp. 555, 561 (S.D. N.Y. 1967). In *Stonehouse* the Seventh Circuit determined it could not follow *Sagansky* on the basis of the statutory coverage. In this case, on the other hand, the Tenth Circuit elected to follow *Sagansky*, expressly declining to follow *Stonehouse*. Both the decision below and *Sagansky* evidence more a judicial formulation of the Congressional intention than an analysis of the statutory language actually adopted and enacted by the Congress. In the decision below, for example, the Court concluded that "It is unlikely in framing section 1084(a) that Congress considered betting transactions to move in but one direction in the use of the telephone" (App., p. 5a, *infra*). See also, *Sagansky*, 358 F.2d at 200.[2]

As all the decisions have recognized, the leading case holding that this statute cannot properly be interpreted to include receipt is *Telephone News*. Its reasoning from

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[2] While the petition for certiorari in *Sagansky*, O.T. 1966, No. 131, included the question being presented in this petition, its primary thrust was directed to the issue of entrapment. Moreover, inasmuch as the petition in *Sagansky* was filed prior to the decision in *Stonhouse*, it could not and did not present the square conflict among the Circuits which is presented herein.

the statutory text, not directly answered in any of the subsequent cases, was as follows:

> "We must reject the theory that 'transmission' as used in subsection (a) means sending or receiving. Whatever validity there might be to the argument that 'transmission,' in some contexts, has a meaning broader than the term 'sending,' it is plain that Congress meant it as 'sending' in this statute. Subsection (d) uses the term 'transmitting or receiving,' and it is illogical to suppose that Congress would not have used both terms in both subsections had it meant to include 'receiving' in subsection (a). *We shall not assume that 'transmission' has one meaning in subsection (a) and another in subsection (d), nor that 'receiving' in subsection (d) is superfluous.*" 220 F. Supp. at 638.

Manifestly, a conflict exists on this issue in the Federal Courts. The resultant uncertainty and confusion is a disservice to the law and should not be allowed to stand. It permits defendants who have received but not initiated wire communications to stand convicted in some Circuits while convictions based on like evidence are reversed elsewhere. Such inconsistent administration of a Federal criminal statute can be reordered only by decision of this Court.

II. THE DECISION BELOW IS IN CONFLICT WITH THE APPLICABLE DECISION OF THIS COURT.

In *Telephone News*, ruling on the appeal from the decision of the three-judge Court, this Court necessarily gave consideration to the merits of the statutory issues at bar. In that case which included the holding that "transmission" cannot be interpreted in this statutory context to

include receiving as well as sending, this Court without opinion entered a *per curiam* judgment of affirmance.[3] The decision below, admittedly at war with *Telephone News*, is thus in conflict with a decision of this Court.

III. THE DECISION BELOW DECIDES AN IMPORTANT QUESTION OF STATUTORY INTERPRETATION IN THE FEDERAL CRIMINAL LAW CONTRARY TO THE EXPRESS LANGUAGE ENACTED BY THE CONGRESS.

Analysis of the text of Section 1084 demonstrates or strongly suggests that the decision below and *Sagansky* are in error, and *Telephone News* and *Stonehouse* correct. First of all, the contrast in language between (a) and (d), the keystone of the *Telephone News* holding, see page 8, *supra*, appears unanswerable. The *Telephone News* reasoning based upon the textual contrasts actually adopted by the Congress appears plainly correct.

If "transmission" in Section 1084 included "receiving", there would have been no need to add the verb "receiving" in (d). The plain effect of the decision below is to render "receiving" in (d) a redundancy. To this patent demonstration of the true Congressional intention neither the decision below nor *Sagansky* assayed any response whatever. The dispositive principles of statutory construction have been clearly elucidated by this Court. "The statute admits a reasonable construction which gives effect to all of its provisions. In these circumstances we will not adopt a strained reading which renders one part a mere redundancy." *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307-308 (1961). As this Court has repeatedly held,

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[3] A "dismissal or affirmance of an appeal is a decision by the Supreme Court having precedential value * * *." Stern & Gressman, *Supreme Court Practice* (4th ed. 1969) 230-231; *cf. Barton v. Sentner*, 353 U.S. 963 (1957).

"It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed." *Inhabitants of Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883); *United States v. Menasche*, 348 U.S. 528, 538 (1955).

Moreover, analysis of Subsections (a) and (b) confirms that the Congress drew a line between sending or initiating and receiving, and included only the former in the verb and concept of "transmission". Subsection (a), for example, makes illegal the knowing use of a wire communication facility "for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers * * *." Clearly, "transmission" in that context denotes sending, and sending only. Only a sender may transmit a wire communication which entitles the recipient to receive money or credit. The recipient can hardly be authorizing his own money or credit; they must necessarily be sent to him by another at the other's initiative.

Similarly, Subsection (b) utilizes "transmission" in a context which signifies sending or initiating only. It exempts two types of "transmission". The first is transmission "for use in news reporting of sporting events or contests * * *." Again, this Congressional reference to "transmission" denotes sending or initiating the wire communication. For it is the other party, the recipient of the communication sent or initiated by another, who is using it in the news reporting. The second exception is "the transmission of information assisting in the placing of bets or wagers on a sporting event or contest *from* a State where betting on that sporting event or contest is legal *into* a State in which

such betting is legal." Beyond doubt, the specification of "from" and "into" denotes movement in a single direction. Congress directed the statutory condemnation only to the sender or initiator of the wire communication.

It bears reiteration that when Congress intended to encompass "receiving" it expressed that intention clearly and unambiguously. In Subsection (d) Congress did indeed cover "transmitting or receiving", demonstrating its ability to refer to the act of receiving expressly when it desired to embrace that conduct by the statute, and demonstrating beyond peradventure of doubt the distinction it desired to draw, and was in terms drawing, between receiving and transmitting or initiating.

To permit the decision below to pass unreviewed is thus to disregard or derogate the manifest difficulties in harmonizing that decision with the actual text of the statute. There are genuine and serious problems of statutory construction meriting and indeed requiring definitive word from this Court to preclude injustice and conflict.

CONCLUSION

This is an appropriate case in which to resolve the conflict among the Circuits, and insure that henceforth this statutory provision will be applied uniformly and in conformity with the Congressional enactment and the decisions of this Court. These issues are presented herein clearly and cleanly. This case presents a timely opportunity for a conclusive determination by this Court.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

[Filed, May 15, 1972]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 71-1647 – MAY 1972 TERM

UNITED STATES OF AMERICA, *Appellee,*	)	
	)	Appeal From The
	)	United States District Court
v.	)	For The District of Colorado
	)	(D.C. No. 70-CR-299)
MICHAEL ANTHONY TOMEO, *Appellant.*	)	

V. G. Seavy, Jr., Denver, Colorado (James G. Johnston, Denver, Colorado, with him on the Brief), for Appellant.

W. Allen Spurgeon, Assistant United States Attorney (James L. Treece, United States Attorney, and Milton C. Branch, Assistant United States Attorney, with him on the Brief), for Appellee.

Before CLARK*, Associate Justice, SETH and McWILLIAMS, Circuit Judges.

SETH, Circuit Judge.

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* Associate Justice of the United States Supreme Court, Retired, sitting by designation.

This is a direct appeal from a conviction of interstate gambling in violation of 18 U.S.C. §1084(a).

The evidence shows that the appellant was actively engaged in bookmaking in Colorado. Mr. Huber, the Government's only witness to testify as to the interstate character of the offense, is a Wisconsin businessman who had met appellant in Denver. The appellant provided Mr. Huber with his phone number and explained that if Huber wished to place a bet he should call the appellant in Denver. At one point the phone number was changed. Huber placed two or three calls a week during two successive football seasons, calling early in the week to get the odds, and calling back on Saturday or Sunday to place his bets. He testified he did not place straight bets but parlayed three or four teams with the Doyle system, which he could not bet elsewhere. Nearly all of the calls were placed from Monroe, Wisconsin, to Denver, Colorado, and the witness talked to Mr. Tomeo personally. The witness Huber testified he came to Denver from time to time, saw Mr. Tomeo socially, and had discussed the possibility of Mr. Tomeo being a representative of Mr. Huber's business. The two had been acquainted since 1963 or 1964.

There is no question that the appellant was engaged in the business of betting and wagering, the question is whether appellant's acts constituted a crime within the meaning of the statute under which he was charged. 18 U.S.C. §1084(a) reads:

> "Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate . . . commerce of bets or wagers or information assisting in the placing of bets

> or wagers on any sporting event . . . , or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both."

As to the actual placing of bets, appellant argues that the word "transmission" in the statute means sending and not receiving, and it is pointed out that appellant only received the bets, Huber having placed them. With regard to the transmission of odds, appellant argues that the indictment charges transmission "from Monroe, Wisconsin, to Denver and Adams County, Colorado," and it is urged that it would have been physically impossible under the charge for the Denver-based appellant to have transmitted the information.

At present the Circuits do not agree on the meaning and scope of section 1084(a). In *Telephone News System, Inc. v. Illinois Bell Telephone Co.*, 220 F. Supp. 621 (N.D. Ill. 1963), *aff'd* 376 U.S. 782, a case involving recorded horse racing information to anyone calling a particular number, a three-judge court rejected a Government contention that the word "transmission" means receiving as well as sending. The court there held that Congress there meant to use the term "transmission" as sending only, because in other subsections the term "transmission or receiving" was used. Hence both words would have here been used if Congress had intended sending as well as receiving. In a case involving the receipt of ticker tape transmissions, the Seventh Circuit adopted the same construction. *United States v. Stonehouse*, 452 F.2d 455 (7th Cir. 1971).

The Government's position received approval in *Sagansky v. United States*, 358 F.2d 195 (1st Cir. 1066), *cert. denied*, 385 U.S. 816. The court there said:

> "The gist of this contention is that the offense is committed by the one who initially sends in the bet and not by the one who receives it; in other words, the meaning of 'transmission' as used in this statute does not embrace the act of receiving. While this might be a proper construction of the term 'transmission' taken out of context, §1084(a) does not punish the mere transmission of bets or wagers, but rather the 'use' of interstate wire communication facilities for their transmission. When a person holds himself out as being willing to make bets or wagers over interstate telephone facilities, and does in fact accept offers of bets or wagers over the telephone as part of his business, we think it is consistent with both the language and the purpose of the statute to hold that he has 'used' the facility for the transmission of bets or wagers."

The differing results also arise from a different construction of the words "to use" the communication facility. As it pertains here, section 1084(a) proscribes *the use* of the telephone for the "transmission" in interstate commerce of bets or wagers or information assisting in the placing of bets or wagers. The conclusion in *Telephone News* that transmission means sending and not receiving is necessarily predicated on the notion that "use" connotes only the idea of immediate utilization, or single event, that is, the phone is used by the person who picks it up and places the particular call. In *Sagansky*, on the other hand,

the concept of "use" is more encompassing, there it was concluded that the "use" of a wire facility contemplates the broader notion of converting the facility to one's service, that is, customarily employing or making a practice of availing oneself of the facility. In our opinion, an unsophisticated and practical reading of the statute compels the latter interpretation. In reaching this conclusion, we give consideration, as did the court in *Stonehouse*, to the fact that the telephone is designed for a two-way conversation and exchange of information. If we were to accept the appellant's contention, we would effectively deny that any discussion or exchange took place, and we find that assumption rather strained. We also note that an interpretation of use of the wire facility which is limited to the isolated *sending* of messages does not meet the basic purpose of the statute and renders its scope more limited than an everyday experience with the telephone would dictate. The statute deals with bookmakers – persons "engaged in the business of betting or wagering." Bookies *take* bets, they receive them, they handle them; it is a transaction requiring mutuality or a meeting of minds. It is unlikely in framing section 1084(a) that Congress considered betting transactions to move in but one direction in the use of the telephone.

We have considered appellant's remaining arguments and find them to be without merit.

AFFIRMED.

MAY TERM – June 14, 1972

Before Honorable Tom C. Clark, Retired Associate Justice, Honorable Oliver Seth and Honorable Robert H. McWilliams, Circuit Judges

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UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	
v.	)	No. 71-1647
MICHAEL ANTHONY TOMEO, *Defendant-Appellant.*	)	

This matter comes on for consideration of the petition for rehearing filed by appellant in the captioned case.

Upon consideration whereof, the petition for rehearing is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

A true copy
Teste

Howard K. Phillips
Clerk, U.S. Court of
Appeals, Tenth Circuit

By /s/ Anne Cabot
Deputy Clerk

[Filed, December 3, 1970]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA, *Plaintiff,*	)	
	)	CRIMINAL NO. 70-CR-299
v.	)	
	)	INDICTMENT
MICHAEL ANTHONY TOMEO, *Defendant.*	)	18 U.S.C., Section 1084

COUNT I

The Grand Jury charges:

That during the period from on or about the first day of November, 1968, to on or about the 15th day of January, 1969, the exact dates being to the Grand Jury unknown, in the District of Colorado, Michael Anthony Tomeo, being engaged in the business of betting and wagering, did knowingly use and cause the use of a wire communication facility, that is, the interstate telephone, for the transmission in interstate commerce from Monroe, Wisconsin, to Denver and Adams County, Colorado, of information assisting in the placing of bets and wagers on sporting events and contests, such information consisting of the point spread on college and professional football games and the actual placing of bets and wagers on such games, all in violation of Title 18, United States Code, Section 1084.

COUNT II

The Grand Jury further charges:

That during the period from or or about the first day of November, 1969, to on or about the 15th day of January,

1970, the exact dates being to the Grand Jury unknown, in the District of Colorado, Michael Anthony Tomeo, being engaged in the business of betting and wagering, did knowingly use and cause the use of a wire communication facility, that is, the interstate telephone, for the transmission in interstate commerce from Monroe, Wisconsin, to Denver and Adams County, Colorado, of information assisting in the placing of bets and wagers on sporting events and contests, such information consisting of the point spread on college and professional football games and the actual placing of bets and wagers on such games, all in violation of Title 18, United States Code, Section 1084.

JAMES L. TREECE
United States Attorney

/s/ By: W. ALLEN SPURGEON
Assistant United States Attorney

A TRUE BILL:

/s/ Joseph D. Raulerson, Jr.
Foreman

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-82

MICHAEL ANTHONY TOMEO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Colorado, petitioner was convicted of violations of 18 U.S.C. 1084 on two counts charging that, having been engaged in the business of wagering, he knowingly used and caused the use of interstate telephone facilities for the transmission of wagers or information assisting in the placing of wagers on sporting events. He was sentenced to consecutive prison terms of two years and one year, re-

spectively. The court of appeals affirmed (Pet. App. 1a-5a).

The evidence is not in dispute and is summarized in the opinion below (Pet. App. 2a). The fact that petitioner was in the business of wagering was established by three witnesses who testified to having personally placed large bets with petitioner within the State of Colorado on a number of occasions during the relevant periods charged in the indictment. (See Tr. 18-21, 24-26, 32.) [1] On the interstate element, Mr. Huber, a Wisconsin businessman, who had known petitioner since 1963 or 1964 (Tr. 33-34), testified to having used interstate telephone facilities to call petitioner to obtain point spreads and to place bets (Tr. 40). Huber testified that in October 1968 he met petitioner in Denver at a restaurant and asked him where he could telephone petitioner when Huber was back in Wisconsin. Petitioner gave Huber a telephone number in Denver to use for this purpose. Huber thereafter used the number to make calls to petitioner from Wisconsin to obtain the line and to place bets on football games two or three times per week throughout the periods charged in the indictment (Tr. 36-40). At one point during this time petitioner advised Huber that the telephone number had been changed because "the heat was on" (Tr. 43-44).

Petitioner contends that certiorari should be granted to resolve conflict among the circuits on the question whether 18 U.S.C. 1084(a) (Pet. 3) prohibits the

[1] "Tr." refers to the transcript of the proceedings at trial, a copy of which we are filing with the Clerk.

receiving as well as the sending of bets and wagering information by interstate wire facilities. We concede that that is a dispute among the circuits on the reading of the statute, but the present case does not properly frame the issue for resolution.

In *Sagansky* v. *United States*, 358 F.2d 195, certiorari denied, 385 U.S. 816, which the Tenth Circuit below followed, the First Circuit held that the term "transmission" encompassed the use of a telephone to receive a bet. By contrast, in *United States* v. *Stonehouse*, 452 F.2d 455, the Seventh Circuit reversed the conviction of a tavern owner engaged in the business of wagering who had a Western Union ticker tape printer in his place of business, on the ground that Section 1084 applies only to the sending of wagering information.[2]

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[2] However the Seventh Circuit was at pains to distinguish the ticker tape machine from the telephone, the "wire communication facility" involved in this case and *Sagansky* (452 F. 2d at 456):

> The issue is starkly presented because appellant's ticker tape enabled him to receive, but not to transmit, information which assisted in the placing of bets on sports events. The ticker tape is, therefore, unlike a telephone which provides a means for communication between two persons, each of whom normally transmits, as well as receives, some information during any use of the facility.

Petitioner also alleges a conflict with this Court's *per curiam* affirmance, 376 U.S. 782, of the decision of a three-judge district court construing Section 1084(d) in *Telephone News System, Inc.* v. *Illinois Bell Telephone Co.*, 220 F. Supp. 621 (N.D. Ill.). In the course of its decision the district court did adopt the view, subsequently adhered to by the Seventh Circuit in *Stonehouse, supra*, that Section 1084(a) reached only the sending of wagering information by telephone. See 220 F. Supp. at 638. This issue, however, was not an integral part of the district court's holding and was not one of the

However, an analysis of the indictment here shows that the conviction may be sustained under either view of the statute for two separate reasons. Thus the issue petitioner tenders is not squarely presented, even though the court below discussed it at length. The first count of indictment charged (Pet. 7a):

> That during the period from on or about the first day of November, 1968, to on or about the 15th day of January, 1969, the exact dates being to the Grand Jury unknown, in the District of Colorado, Michael Anthony Tomeo, being engaged in the business of betting and wagering, did knowingly *use and cause the use of a wire communication facility* that is, the interstate telephone, *for the transmission* in interstate commerce from Monroe, Wisconsin, to Denver and Adams County, Colorado, *of information assisting in the placing of bets and wagers* on sporting events and contests, *such information consisting of the point spread on college and professional football games and the actual placing of bets and wagers on such games*, all in *violation* of Title 18, United States Code, Section 1084. [emphasis added; Count Two is identical except for the dates involved]

The indictment thus charged that petitioner "cause[d] the use of * * * the interstate telephone, for * * * the actual placing of bets and wagers * * *."

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issues presented to this Court on the direct appeal. See the briefs of both parties in No. 772, O.T. 1963. There is thus no conflict between the decision of this Court in *Telephone News System* and the construction of Section 1084(a) by the court below.

This charge was proven by the evidence that petitioner, by providing Mr. Huber with his telephone number in Denver, had caused Huber to use the telephone to transmit his bets interstate. Thus petitioner's conviction must be sustained even if the Section is viewed as applying only to the sending, and not to the rereceiving, of wagering information.[3]

In addition, the statute not only prohibits the use of an interstate telephone "for the transmission * * * of bets or wagers" but also applies to the "transmission * * * of * * * information assisting in the placing of bets or wagers." Although petitioner would leave the impression that he was merely the passive recipient of the calls, the indictment alleged and the evidence showed that during the telephone conversations, petitioner himself sent—transmitted—as well as received, wagering information. In itemizing the

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[3] It is immaterial that Huber, not being in the business of wagering, could not himself violate Section 1084. In *United States* v. *Kelley*, 395 F.2d 727, certiorari denied, 393 U.S. 963, the Second Circuit considered this issue in sustaining a conviction for violation of Section 1084(a) under a substantially identical indictment and explained (395 F. 2d at 729):

> A person may be held responsible as a principal under 18 U.S.C. § 2(b) for causing another to do an act which would not have been criminal if directly performed by that other person. United States v. Lester, 363 F. 2d 68, 72-73 (6th Cir. 1966), cert. denied 385 U.S. 1002, * * *. The evidence showed that appellant told these bettors how to get in touch with him if they wished to make a bet and, therefore it was reasonable to expect that they would make interstate calls. This is sufficient to find that he "caused" the interstate calls. United States v. Scandifia, 390 F. 2d 244 (2d Cir. 1968); Bass v. United States, 324 F. 2d 168 (8th Cir. 1963).

wagering information transmitted during the interstate telephone calls, the indictment referred to "the point spread on college and professional football games * * *." As the witness Huber explained, he asked petitioner to furnish him with the point spread prior to calling back to place the bet. In providing this assistance, petitioner was undeniably the transmittor of information within the meaning of the statute. On this additional ground, the conviction must be sustained without reaching the issue whether Section 1084(a) applies to the mere receipt of wagering information.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1972.

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MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-82

MICHAEL ANTHONY TOMEO,
Petitioner,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to The United States Court of Appeals for The Tenth Circuit

REPLY BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-82

MICHAEL ANTHONY TOMEO,
Petitioner,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Tenth Circuit

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REPLY BRIEF FOR PETITIONER

THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THE CONFLICT AMONG THE CIRCUITS WHICH THE GOVERNMENT NOW CONCEDES

1. A conflict among the Circuits as to a significant issue of statutory interpretation in the Federal criminal law was the primary ground of this petition. In response, the Memorandum for the United States in Opposition ("Opp.") seeks to obfuscate the issue and pleads confession and avoidance.

It confesses that there is a conflict: "We concede that that is a dispute among the circuits on the reading of the statute" (Opp. 3). Nevertheless it opposes a grant of the petition because it does not deem this case an appropriate one for resolution of the admitted conflict. But as we shall demonstrate, the Government's position is bottomed upon a misconception of the record in this case.

The Government seeks to persuade the Court that the interpretation of 18 U.S.C. §1084(a) – as to which there is undoubted conflict – is not necessarily involved herein inasmuch as Petitioner's conviction could be sustained under 18 U.S.C. §2(b), which permits treating a defendant as a principal if he has willfully caused a criminal act to be done.[1] The vice in this contention is that this case was not submitted to the jury on any such basis. Quite to the contrary, the trial record shows that in the critical colloquy at the bench prior to the instructions to the jury, the prosecution as well as the defense eschewed this theory; and the Court expressly declared that "the case has been tried on a different basis; on the basis that he is a direct principal" (Tr. 75).[2]

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[1] Section 2 of 18 U.S.C. reads in its entirety as follows:

> "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> "(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

[2] "Tr." refers to the transcript of the proceedings at trial, a copy of which has been filed with the Clerk of this Court. Opp. 2, n. 1.

The pertinent portions of the trial record as as follows:[3]

> "MR BRANCH [the prosecutor]: In view of the allegation that the defendant caused the use of the wire communication facility, *perhaps we could ask for an instruction under Section 2* – United States Code – 18 U.S.C., Section 2. I want to know whether it really is necessary under the facts of this case. *The statute doesn't say anything about causing the use. It just says using it.* But the evidence is that –
>
> "THE COURT: *I think the case has been tried on a different basis; on the basis that he is a direct principal.*
>
> *"Do you have any objection to this?*
>
> "MR. SEAVY [defense counsel]: Well, that goes back to our theory, that 18 U.S.C., Section 2, doesn't have anything to do with it, and what Mr. Branch is saying now indicates to us that there is merit we think on the motion to dismiss.
>
> "MR. BRANCH: No, just the possibility. I don't think –
>
> "THE COURT: I think if anything should be given, the jury ought to be told that a person who is an agent to do an act would be in violation of the law. That's the way

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[3] Emphasis added throughout this Reply Brief.

I'd do it, *But, I don't think there is any need of – of giving it anyway. Maybe it would be better to leave it alone.*

"MR. SEAVY: *Okay. Then in making the argument, I don't have to be concerned about 18 U.S.C., Section 2.*

"THE COURT: *No*" (Tr. 74-75).

Accordingly, no Section 2 issue was presented to the jury and Petitioner's conviction cannot be sustained on any such basis. Surely the Government should not be permitted to dissaude this Court from reviewing this conviction upon a ground which the record demonstrates was deliberately never submitted to the jury. The Government cites the indictment as though the indictment, rather than the instructions to the jury and the understanding and agreement of both counsel and the District Court, describes the actual subsequent conduct of the case.

In plain legal truth and actual historical fact, the jury was not permitted to and did not consider the 18 U.S.C. §2 theory which the Government now proffers. And a conviction may not be sustained on appeal on a theory which was not submitted to the jury. *Cole v. Arkansas,* 333 U.S. 196 (1948); cf. *Spevack v. Klein,* 385 U.S. 511 (1967); *Russell v. United States,* 369 U.S. 749, 766 (1962).

Accordingly, the Government's primary plea of avoidance, that this case can be taken as involving Section 2 of Title 18 rather than Section 1084, falls and must be rejected. This case does indeed involve the Section 1084 issue on which there concededly is clear conflict.

2. The Government similarly relies upon the assertion that Petitioner might have been convicted of "*transmission* * * * of * * * information assisting in the placing of bets or wagers" as opposed to the *transmission*

* * * of bets or wagers" as precluding the clear presentation of the statutory issue in conflict, the interpretation and application of the term "transmission" (Opp. 5).[4] This contention is plainly frivolous, however, for the issue in conflict is whether "transmission" covers the *receipt* of telephone calls. That issue persists whether the calls are received in regard to placing bets or wagers or information assisting therein. On that issue, whether the mere receipt of such calls may constitute a violation of 18 U.S.C. §1084(a), there certainly is conflict: The Tenth Circuit in the decision below and the First Circuit are on one side; while the Seventh Circuit and this Court are on the other.[5] That issue is squarely presented in this case, inasmuch as

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[4] Again, the record refutes the Government. For the indictment, which the Government relied on for the other branch of its argument, as noted above, expressly charges "transmission" of both bets and information solely "*from* Monroe, Wisconsin, *to* Denver and Adams County, Colorado" (Petition, 7a-8a) and there is absolutely no evidence Petitioner was ever in Monroe, Wisconsin.

[5] The Government asserts that this Court's decision in *Telephone News System, Inc. v. Illinois Bell Telephone Co.*, 376 U.S. 782 (1964), is not in conflict with the decision below, because the issue "was not an integral part of the District Court's holding" (Opp. 3, n. 2). In fact, however, that case involved a constitutional attack against Subsection (d) of §1084 as well as the corresponding Illinois statute. The United States, which was the real party in interest, contended that the constitutional issue need not be decided because its action of seeking the cessation of telephone service could be sustained under Subsection (a), the very statutory provision involved in the instant case. Accordingly, disposition of the Subsection (a) issue was indeed an integral part of the District Court's holding. The Government simply misreads the case. Obviously, this Court would not have affirmed a constitutional holding if it could have avoided the constitutional issue on statutory grounds. Cf. *Parker v. Los Angeles County*, 338 U.S. 327 (1949); *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947).

the evidence concededly shows that Petitioner initiated no calls.[6]

* * *

For the reasons stated herein and in the petition, this case presents a conflict among the Circuits as well as conflict with a decision of this Court on an important issue of Federal criminal law, evidently decided erroneously by the Court below, which requires resolution by this Court. This petition for a writ of certiorari should be granted.

Respectfully submitted,

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[6] The Government assays no response to the demonstration in the petition that the correct interpretation of the statute is contrary to the decision below and in accord with *United States v. Stonehouse*, 452 F.2d 455 (7th Cir. 1971), and *Telephone News Sytem, Inc. v. Illinois Bell Telephone Co.*, 220 F. Supp. 621 (N.D. Ill.), *affirmed*, 376 U.S. 782 (1964). By its silence the Government in effect concedes that the decision below is contrary to the express language enacted by the Congress, as was demonstrated in Point III of the petition (pp. 9-11).

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-82

MICHAEL ANTHONY TOMEO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Although we acknowledged a conflict among the circuits on whether 18 U.S.C. 1084(a) prohibits the receiving as well as the sending of wagering information, we suggested that the present case does not provide a suitable vehicle for resolving that dispute. Among the reasons given for this position was that the indictment alleged and the evidence showed that petitioner *caused* the sending of such information by the other participant in the transaction. Thus, the conviction need not rest on petitioner's conduct in receiving the bets.

478-435—72——1

In his Reply Brief, petitioner attempts to refute the contention that the conviction in this case may be sustained on the ground that he *caused* his bettor to use interstate wire facilities to transmit his wagers. Petitioner claims that this theory of the case was deliberately withdrawn from the jury's consideration. However, both government and defense counsel, in summation, argued the case on this theory, and the court instructed the jury on the issue. The colloquy quoted by the petitioner (Tr. 74–75; Reply Br. 3–4) deals only with whether a special instruction on 18 U.S.C. 2 should be given by the court.

1. In his summation defense counsel argued as follows (Tr. 83–84):

> Now, the evidence is clear that Mr. Tomeo [petitioner] never transmitted anything from Monroe, Wisconsin, to Denver, Colorado. The evidence before you is that Mr. Tomeo, so far as Huber [the bettor] was concerned, was never in Wisconsin. He couldn't transmit information from Wisconsin to Denver. But, then, also in this indictment the phrase is used, Michael Anthony Tomeo did knowingly use or cause to be used a wire communication facility. So I suppose sometime along the line although I haven't heard it yet, the government might say, "Well, Michael Anthony Tomeo caused Fred Huber to use the phone from Monroe, Wisconsin, to Denver, Colorado, to place bets." Well, I ask you, ladies and gentlemen, what evidence is there of that that Michael Tomeo caused Fred Huber to get on the telephone in Monroe, Wisconsin, or anyplace else that he travels to, and

place bets to Michael Tomeo in Denver? There just is absolutely no evidence of that. There is no evidence that Michael ever called—even initiated a call from Denver or anyplace else to Fred Huber in Monroe, Wisconsin, or anyplace else, and caused Fred Huber to place any bets. There is no such evidence here. No evidence that Michael Tomeo called Fred Huber anyplace. All of the evidence is that on these unspecified occasions that happened frequently during these two years that the calls were initiated by Fred Huber, as he said, most of the time from Wisconsin—No evidence of Michael Tomeo causing Fred Huber to do anything. And certainly no evidence of Michael Tomeo transmitting anything from Monroe, Wisconsin, to Denver, Colorado.

2. In response, the prosecutor argued (Tr. 86–87):

Mr. Huber testified he got the number from Mr. Tomeo. He was told to call to get the point spread. He was told to call to place his bets, and if he could not have had that number to call from Mr. Tomeo, he couldn't have called. Counsel argues that there is no evidence that Mr. Tomeo ever made a call from Monroe, Wisconsin. The indictment and the evidence is not that he made calls from Wisconsin, but he caused the use of this interstate facility, the telephone, from Monroe—I mean to Denver, and he caused Mr. Huber to use it for the purpose of getting information from him so that he could place bets—so that Mr. Huber could place bets with Mr. Tomeo.

3. In instructing the jury on the essential elements of the offense charged, the court set forth as one such element (Tr. 90);

> That the defendant used a wire communication facility for the transmission in interstate commerce from Monroe, Wisconsin, to Denver and Adams County, Colorado, or caused the use thereof.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1972.

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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-82

MICHAEL ANTHONY TOMEO,

Petitioner,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to The United States Court of Appeals for The Tenth Circuit

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PETITIONER'S REPLY TO SUPPLEMENTAL MEMORANDUM

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UNITED STATES OF AMERICA

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PETITIONER'S REPLY TO SUPPLEMENTAL MEMORANDUM

In order to appreciate the extraordinary "Supplemental Memorandum" which the Government has filed at the eleventh hour in this proceeding, it becomes necessary to restore to context the questions presented in the original Petition. Petitioner there suggested that this case presents the question whether evidence of the *receipt* of telephone calls made from another State regarding wagering is sufficient to support a conviction under 18 U.S.C. §1084(a) which makes illegal only "the *transmission*" of such communications.[1] Stated otherwise, Petitioner asked whether,

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[1] Emphasis is added throughout this Brief.

when Congress specified "transmission" in one subsection of a statute and "transmits or receives" in another subsection of that statute, may the subsection which uses the word "transmission" alone be interpreted as if "transmission" were used in conjunction with "receiving".

As reasons for granting the writ, Petitioner pointed out that the decision below recognized and reflected a division among the Circuits as to the correct interpretation of the statutory provision involved: "At present *the Circuits do not agree* on the meaning and scope of Section 1084(a)." (App. p. 3a). When the Seventh Circuit was called upon to interpret this statutory provision it too recognized the conflict: "Although we recognize that *there is language* in at least one case involving the use of the telephone *that points in the other direction*, we believe that the coverage of paragraph (a) of Section 1084 is limited to prohibited transmissions and does not encompass mere reception". *United States v. Stonehouse*, 452 F.2d 455, 456-457 (7th Cir., 1971).

In its Reply Brief, Petitioner pointed out that the Government has sought to plead confession and avoidance: "We *concede that that is a dispute among the circuits* on the reading of the statute * * *." (Memorandum for the United States in Opposition, "Opp.", p. 3.); but the Government then seeks to avoid the consequences of that admission by urging that "the present case does not properly frame the issue for resolution". (*Ibid.*)

To support this contention, the Government argues that the conviction below is sustainable on two separate bases: not only did the Petitioner use a wire communication facility for the transmission of wagering information, but also, the Government now contends, the Petitioner caused

such use. Accordingly, if the conviction cannot be sustained under Section 1084(a) as to the transmission aspect of the charge, the Government asserts that it should be sustained on the theory that the Petitioner caused such use. In support of this argument the Government relied heavily upon the decision of the Second Circuit in *United States v. Kelley*, 395 F.2d 727 (2d Cir., 1968) certiorari denied 393 U.S. 963 (Opp. p. 5).

The *Kelley* case involved an indictment in which the defendant was charged not only with violation of §1084 (a) *but also with a violation of 18 USC §2(b).* And, based upon that explicit charge, the Second Circuit opined that "[a] person may be held responsible as a principal under 18 U.S.C. §2(b) for causing another to do an act which would not have been criminal if directly performed by that other person". Petitioner answered that assertion in its Reply Brief by pointing out that there was no 18 U.S.C. §2 issue in this case, and cited pertinent portions of the trial record to demonstrate that to be so.

And now comes the Government in its "Supplemental Memorandum" and, without a single word concerning the meaning and impact of 18 U.S.C. §2 to cases such as this, attempts to further obfuscate matters by referring to sections of the trial record to indicate that the question of "cause" was in fact argued to the jury. But it should be noted that the word "cause" appears nowhere in 18 U.S.C. §1084(a). The only statute which makes it a crime to *cause* the use of a wire communication facility for transmission of wagering information is 18 U.S.C. §2(b).[2]

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2 "Whoever willfully *causes* an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." 18 U.S.C. §2(b).

However, as may be plainly seen, the indictment in this case charges only violations of 18 U.S.C. §1084(a); it does not even mention 18 U.S.C. §2. (App. p. 7a-8a).[3]

Accordingly, the Government's argument that there is an alternative ground on which the conviction in this case can be based is manifestly incorrect. Indeed, that argument proves far more than the Government intends. It demonstrates that, in addition to the conflict between the Circuits as to the scope and meaning of §1084(a), there is a further conflict in these cases involving the relationship of §1084(a) with §2(b). The Government has thus presuasively presented a further reason why the Petition in this case should be granted: to give this Court an opportunity to clarify definitively this obviously perplexing area of the federal criminal law.

Respectfully submitted,

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[3] Thus, it is no wonder that the Trial Court observed that "the case has been tried on a different basis" and defense counsel concurred "that 18 U.S.C., Section 2, doesn't have anything to do with it". (Tr. 75)